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OFFICE OF PETITIONS

In re Application of :
Ledbetter, et al. :
Application No. 10/627,556 :
Filed: July 26, 2003 :
Attorney Docket No. 49076.000004.CIP2 :
ON PETITION

This is a decision on the renewed petition, filed March 7, 2005, under 37 CFR 1.183 to waive the requirements of 37 CFR 1.10.

The renewed petition is **dismissed**.

The instant renewed petition was filed to correct what petitioner believes is an incorrect filing date accorded the above-cited application. Petitioner maintains that the correct filing date for the application should be July 25, 2003, not the currently accorded date of July 26, 2003. A petition under 37 CFR 1.183 to waive the requirements of 37 CFR 1.10 was first filed on June 28, 2004, and dismissed by a decision mailed August 3, 2004.

It is noted that the decision of August 3, 2004, made the argument that the requirements of 37 CFR 1.10 could not be suspended as the requirements of 37 CFR 1.10 are requirements of a 35 U.S.C. 21(a) which the Patent and Trademark Office has no authority to waive. Petitioner's argument to the contrary, as made in the instant renewed petition, is persuasive especially when paired with the undersigned's reading of section 513 of the *Manual of Patent Examining Procedure* (MPEP). Accordingly, it is conceded that the requirements of 37 CFR 1.10 can be suspended pursuant to 37 CFR 1.183 if petitioner demonstrates that an "extraordinary situation" prevented compliance with 37 CFR 1.10. Petitioner has not established that an "extraordinary situation" prevented the subject application from being deposited with the United States Postal Service (USPS), Express Mail Service on July 25, 2003, such that the requirements of 37 CFR 1.10 should be suspended. Petitioner will note that this decision also addresses some arguments made in petition filed June 28, 2004, that were not adequately addressed in the decision of August 3, 2004.

Petitioner argues that the "extraordinary situation" resulted, in part, from a routine and scheduled shut down of the law firm's server at 10:00 p.m. PST on June 25, 2003.¹ Petitioner further states that the

¹ The petition of June 28, 2004, indicates that the law firm's server was routinely shut down at 1:00 EST (10:00 p.m. PST) for maintenance.

Intellectual Property (IP) group of the law firm that was preparing the application was small and relatively new to the firm and unaware of this practice at the time. Counsel's unawareness of the routine shut down of the server does not imply a lack of diligence or exercise of ordinary care relative to the filing of the application, but counsel's unawareness of a routine and scheduled shut down of the law firm's server does not amount to an "extraordinary situation" such that the Office should provide such an extraordinary remedy as according the subject application a filing date other than the date it was deposited with the Express Mail Service. While the term "extraordinary situation", as it is used in 37 CFR 1.183, is not clearly defined, it is arguable that the term "extraordinary situation" was not meant to include a situation where the preparation of a patent application was delayed because of the routine and scheduled maintenance of a server which, regretfully, some of the remote employees of the law firm were not made aware.

Petitioner further argues that the change of operating hours for the Midway branch of the USPS presented an "extraordinary situation." In support, petitioner filed the declarations of Dale Stuckey, Jr. and John Norton, both employees of the Midway branch, in which they state that they were presented with the Express Mail package containing the subject application at 11:40 p.m. on June 25, 2003, but declined to accept the package because the Express Mail window closed at 11:00 p.m. The declarations and petition do not indicate that the refusal to accept the package was arbitrary, rather that the post office hours had changed. Petitioner is careful to note that Ms. Kielt, who attempted to make the deposit, was reasonable in relying on the fact that the post office was open until 12:00 a.m. as deposits were routinely made to this post office with the closing time understood to be 12:00 a.m. Ms. Kielt's may have been reasonable in relying on her understanding of the Midway branch's hours, but, absent evidence that the Midway branch decided arbitrarily on June 25, 2003, to stop accepting Express Mail after 11:00, the change in the post office's hours is not extraordinary. The post office's change in operating hours and petitioner's failure to note the same do not constitute an "extraordinary situation." It is a fact that businesses, including the branches of the United States Post Office, change their operating hours and that the hours of operation may not be same at all post offices. While the customer may be inconvenienced by such a change (especially when the customer is not previously made aware of the change, as in this case) the change in operating hours cannot be viewed as an "extraordinary situation" especially when the post office cannot be said to have acted arbitrarily, i.e., changing the hours of operation frequently. While the post office's change in operating hours, unbeknownst to petitioner, is unfortunate, it is not extraordinary based on the facts presented.

It is further noted that petitioner suggests that an agency relationship exists between the United States Postal Service (USPS) and the USPTO and that the USPTO should, therefore, provide petitioner with a remedy for the "unwarranted action of the Post Office, [inconsistency] of the hours of operation for Express Mail at different Post Office locations, and changes in those hours of operation after longstanding reliance had been established." The question of whether an agency relationship exists between the USPS and the USPTO will be not be addressed here, but it is sufficient to state that the USPTO has no authority to set policy for or effect the hours of operation of the branches of the USPS. Certainly, the USPTO can provide a remedy where it is established that in refusing to accept an Express Mail package, the post office acted arbitrarily—'arbitrarily' meaning conducting business in manner that is contrary to the branch's policies and procedures. Petitioner has not, however, established that the Midway post office branch acted arbitrarily relative to the Express Mail package in question.

Finally, petitioner intimates that the refusal of the Midway branch to accept the Express Mail package on June 25, 2003, should be designated as a postal interruption or emergency pursuant to 35 U.S.C. § 21 and 37 CFR 1.6(e). It is noted that Section 511 of the MPEP provides, in pertinent part, that:

The statute requires that the correspondence was complete and ready to be deposited with the USPS on the filing date requested (e.g., complete application papers have been prepared and printed) and that the correspondence could not have been deposited with the USPS on the requested filing date for the sole reason that the postal service was not available due to the interruption or emergency designated by the Office.

The Office of Petitions does not have the authority to decide what is, or is not, a postal interruption or emergency, as the terms are used in the relevant statute and rule. At the time this decision was authored, there was no notification from the Commissioner that a designated postal interruption or emergency existed on June 25, 2003, relative to the Midway branch of the USPS that would affect the filing date of the subject application. Absent such a determination, the Office does not have the authority to grant the application a filing date other than the date it was actually received at the USPTO or the date it was actually deposited with the USPS, Express Mail Service.


Based on the aforementioned, the renewed petition under 37 CFR 1.183 to suspend the requirements of 37 CFR 1.10 is dismissed.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
 Commissioner for Patents
 Box 1450
 Alexandria, VA 22313-1450

By facsimile: (703) 872-9306
 Attn: Office of Petitions

Telephone inquiries concerning this decision should be directed to the undersigned at (571) 272-3222.


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